Office - Supreme Court, U.S.
FILED
AUG 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,
v.
WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

JURISDICTIONAL STATEMENT

WILLIAM L. ROBINSON
*FRANK R. PARKER
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May a three-judge district court panel following *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982), defer to the articulated state racial policies to which the Attorney General interposed an objection pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c?

2. In ordering into effect an interim congressional reapportionment plan, is a District Court panel bound to remedy the condition which gave rise to a Section 5 objection?

3. May a District Court panel order into effect an interim redistricting plan which fails to satisfy the criteria for court-ordered plans set forth in *Connor* v. *Finch*, 431 U.S. 407 (1977)?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	8
I. THE DISTRICT COURT'S DETERMINATION TO IMPLEMENT A COURT-ORDERED PLAN WHICH EMBODIES THE RACIAL POLICIES OF THE OBJECTED-TO PLAN IS CLEARLY ERRONEOUS AND VIOLATES CONTROLLING PRECEDENTS OF THIS COURT	9
A. The District Court's Decision to Adopt the Racial Policies of the Objected-to Plan Is Not Compelled by *Upham* v. *Seamon* and Is Contrary to this Court's Rulings in *Upham*, *McDaniel* v. *Sanchez*, and *White* v. *Weiser*	9
B. Under the Section 5 Preclearance Procedures of the Voting Rights Act, the District Court Was Without Jurisdiction to Consider the Validity of and Approve the State's Racial Policies Embodied in S.B. 2001	14
C. Alternatively, the District Court Erred in Approving the State's Racial Policy of Creating Majority White, 40% Black Districts and Implementing that Policy in the Simpson Plan Because that Policy Is Rooted in Purposeful Racial Segregation	16
II. THE DISTRICT COURT-ORDERED PLAN VIOLATES THE GUIDELINES ESTABLISHED BY THIS COURT IN *CONNOR* v. *FINCH* AND FAILS TO REMEDY BLACK VOTE DILUTION	23

TABLE OF CONTENTS—Continued

Page

CONCLUSION 30

APPENDIX

Appendix A. District Court Decision and Order (Filed June 9, 1982) 1a

Appendix B. Attorney General's Section 5 Objection Letter (Dated March 30, 1982) 25a

Appendix C. *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982) 31a

Appendix D. Notice of Appeal (Filed June 15, 1982) 41a

Appendix E. Constitutional Provisions and Statutes Involved 45a

TABLE OF CASES

Page

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 16
Beer v. *United States*, 425 U.S. 130 (1976) 28
Brooks v. *Winter*, 50 U.S.L.W. 3998 (1982) 8
Burton v. *Hobbie*, Civ. No. 81-617-N (M.D.Ala., June 21, 1982) 9
Busbee v. *Smith*, Civ. No. 82-0665 (D.D.C. July 22, 1982) 9
Bussie v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D.La. 1971) 29
Chapman v. *Meier*, 420 U.S. 1 (1975) 30
City of Rome v. *United States*, 446 U.S. 156 (1980) 14
Connor v. *Finch*, 431 U.S. 407 (1977) ..... 2, *passim*
Connor v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court), *aff'd mem.*, 386 U.S. 483 (1967) 21, 23
Connor v. *Waller*, 421 U.S. 656 (1975) 16
Gaffney v. *Cummings*, 412 U.S. 735 (1973) 29
Hathorn v. *Lovorn*, —— U.S. ——, 50 U.S.L.W. 4664 (1982) 15
Karcher v. *Daggett*, —— U.S. ——, 50 U.S.L.W. 3767 (1982) 29
Kirksey v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977) 24, 28
McDaniel v. *Sanchez*, 452 U.S. 130 (1981) ..... 9, *passim*
Mississippi v. *Smith*, Civ. A. No. 82-0956 (Filed June 28, 1982) 2, 3
Mississippi v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980) 8, 24
Moore v. *Leflore County Board of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974) 24
Perkins v. *Matthews*, 400 U.S. 379 (1971) 16
Robinson v. *Commissioners Court, Anderson county, Texas*, 505 F.2d 674 (5th Cir. 1974) 24
Rogers v. *Lodge*, 50 U.S.L.W. 5041 (U.S. July 1, 1982) 15

TABLE OF CASES—Continued

	Page
Roman v. *Sincock*, 377 U.S. 695 (1964)	24
Seamon v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982) (three-judge court)	11, 12
Sims v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court)	24
Taylor v. *McKeithen*, 407 U.S. 191 (1972)	16
United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977)	28
United States v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978)	16
United States v. *Mississippi*, 380 U.S. 128 (1965)	17
Upham v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982)	7, *passim*
White v. *Weiser*, 412 U.S. 783 (1973)	8, passim

STATUTES:

28 U.S.C. 1253	3
28 U.S.C. 2284	3
42 U.S.C. 1973c	2, 3

CONGRESSIONAL REPORTS:

S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

JURISDICTIONAL STATEMENT

Appellants, black citizens and registered voters of Mississippi,[1] appeal from the final judgment of the United States District Court for the Northern District of Mississippi, entered June 9, 1982, ordering into effect a

---

[1] Appellants in this case are Owen H. Brooks, Sarah B. Johnson, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated.

Appellees are William F. Winter, Governor of Mississippi, William A. "Bill" Allain, Attorney General of Mississippi, Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities as members of the Mississippi State Board of Commissioners, and the State Board of Election Commissioners, Mississippi Democratic Executive Committee, and Mississippi Republican Executive Committee.

court-ordered congressional redistricting plan which deprives black voters of an opportunity to elect candidates of their choice in any of the five districts. Appellants contend that the District Court used an incorrect legal standard in deferring to the state racial policies which gave rise to a Section 5 objection by the Attorney General, failed to remedy the condition which precipitated the objection, and failed to follow the criteria for court-ordered interim reapportionment plans set forth by this Court in *Connor* v. *Finch*, 431 U.S. 407 (1977).

Because of the need to define the appropriate constitutional and statutory guidelines for court-ordered congressional reapportionment plans in the wake of the 1980 Census, appellants move the Court for an expedited appeal.

OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of Mississippi is unreported and is set out in Appendix A. The Attorney General's objection rendered pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the legislatively-enacted "Least Change" plan is included as Appendix B.

An interim opinion of a three-judge District Court for the District of Columbia in Mississippi's Section 5 lawsuit to preclear the "Least Change" plan, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982), denying the state's motions for partial summary judgment and to exclude certain evidence, is also unreported and is included in Appendix C.

JURISDICTION

The judgment of the three-judge District Court, ordering into effect a court-ordered congressional redistricting plan, was entered on June 9, 1982. Appellants filed a notice of appeal on June 15, 1982, Appendix D, attached.

This appeal is being docketed in this Court within 90 days of the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment; 42 U.S.C. 1973c. (Included verbatim as Appendix E).

STATEMENT OF THE CASE

In August, 1981 the Mississippi Legislature enacted S.B. 2001 (Miss. Laws, 1981 Extra. Sess., ch. 8), known as the "Least Change" plan, redistricting the state's five congressional districts, and submitted the new plan to the Attorney General of the United States for preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. This plan continued the state's practice, first adopted in 1966 directly after passage of the Voting Rights Act, of dividing the heavy black population concentration of the Mississippi Delta area in the northwest portion of the state among several majority white congressional districts. All five congressional districts in S.B. 2001 were majority white in population; the highest black percentages were 47.95% (District 2) and 45.32% (District 4).[2]

After requesting additional information, the Attorney General interposed a timely objection to S.B. 2001 on March 30, 1982 (Appendix B, attached). In objecting, the Attorney General found:

---

[2] The black population percentages in each district of S.B. 2001 were:

District	% Black
1	29.79%
2	47.95%
3	33.38%
4	45.32%
5	19.54%

Memorandum Opinion (hereinafter "Mem. Op.") p. 6a, Appendix A.

Since the late 1800's and until 1966, the State of Mississippi maintained a Congressional districting configuration which included a majority black district in the Mississippi Delta area. The state's reapportionment of 1966 did not continue a Delta district similar to the one which at that time had included a sixty-five percent black population majority. Rather, the 1966 plan inaugurated a districting configuration which fragmented the Delta area among three districts.

* * * *

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2, and 3 of the reapportionment plan [S.B. 2001] have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, there-

> fore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

Appendix B, Section 5 objection letter, pp. 26a-28a.

Although the Mississippi Legislature was in session when the Attorney General's objection was announced, it adjourned without enacting a new plan and instead filed a Voting Rights Act declaratory judgment action in the District Court for the District of Columbia seeking judicial preclearance of S.B. 2001. Mem. Op., pp. 2a-3a. That action is still pending. *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C., filed April 7, 1982), memorandum opinion and order denying plaintiffs' motion for partial summary judgment and motion *in limine*, June 28, 1982 (Appendix C, attached).

Appellants, twelve black voters of Mississippi who reside in the Delta area and who represent a class certified as all voters and all black voters of Mississippi, filed this action on April 5 requesting injunctive relief against S.B. 2001, challenging the constitutionality of the preexisting congressional districts (the 1972 plan) for excessive population malapportionment, and seeking a court-ordered congressional redistricting plan for the 1982 Mississippi congressional elections which protects their rights secured by the United States Constitution and the Voting Rights Act. A three-judge District Court was convened pursuant to 28 U.S.C. § 2284, and the District Court entered an order temporarily postponing the July 1 party primary elections for congressional candidates and held a hearing on May 13-14.

Appellants urged the District Court to order into effect one or the other of two plans (the "Kirksey plans") which kept the Delta area intact, and, to create an equally-populated Delta district, combined the Delta area with adjoining, predominantly black portions of Hinds County and Jackson resulting in a majority black district in each plan, Mem. Op., pp. 7a-8a. Appellants' pre-

ferred plan had one majority black district which was 64.37% black, and the "fall-back" plan had a majority black district which was 65.81% black. *Id.*[3] The AFL-CIO, as amicus curiae, urged the court to order into effect a plan (the "Simpson plan") which combined the black-majority Delta area with six predominantly white counties in the east-central portion of the state to produce four majority white districts and one district with a slight black population majority of 53.77%. Mem. Op., p. 8a. All five districts in the Simpson plan, however, are majority white in voting age population.[4]

In its opinion, the District Court held that the existing districts were unconstitutionally malapportioned, enjoined implementation of S.B. 2001 because of the Section 5 objection, and determined that all three plans before it met Federal constitutional requirements. Mem. op., pp. 9a-11a. Thus, the District Court held the dispute to "center around claims of dilution of black voting strength." *Id.* at 7a. Citing lack of time and ability independently to create its own plan, the lower court confined its decision to a choice between the two plans submitted by the appellants and the Simpson plan, *id.* at 9a, 11a, which had been developed by the staff of the Mississippi Legis-

---

[3] According to the District Court's opinion, the black population percentages in each of the five districts under each plan is:

District	Kirksey Plan 1	Kirksey Plan 2	Simpson Plan
1	25.60%	25.72%	25.86%
2	64.37%	65.81%	53.77%
3	32.49%	30.36%	31.23%
4	33.83%	33.70%	45.25%
5	19.75%	20.33%	19.84%

Mem. Op., pp. 7a-8a.

[4] The District Court found that the black voting age population of districts is approximately 5% lower than total black population figures. Mem. Op., p. 5a, n.3. The U.S. Census voting age population statistics by race introduced in evidence (Ex. C-1, Attachment C) indicate that the 53.77% black population majority district in the Simpson plan is 48.06% black in voting age population.

lature's Joint Congressional Redistricting Committee on motion of Representative James C. Simpson, a white legislator, *id.* at 8a.

Relying on *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982) (Mem. Op., p. 11a), the District Court felt itself bound by "the state's primary political policies reflected in the passage of S.B. 2001," *id.* at 12a, which it summarized as:

> (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. As to the latter policy, the majority of the Joint Committee and legislature subscribed to the belief that a plan with two minority districts containing at least 40% black population was preferable to a plan that sacrificed two such "high impact" minority districts for one district with a significant black majority.

Id.

Accordingly, the District Court felt compelled by *Upham* to adopt the Simpson plan on an interim basis pending adjudication of the Section 5 preclearance action in the D.C. District Court. The District Court also determined that the Simpon plan more nearly satisfied the State's S.B. 2001 criteria of "preservation of the electoral base of incumbent congressmen" (all of whom are white)[5] and "least possible population deviation" (*id.*) by maintaining a population deviation of only .2141%.[6] *Id.* at 14a.

The State of Mississippi has stipulated that because of the state's past history of discrimination in voting

---

[5] All three plans preserved Mississippi's five incumbent congressmen in their respective districts, and ensured that none of the incumbent congressmen would have to run against each other for reelection. May 13-14 Hearing Transcript, pp. 47, 55.

[6] The total deviations in the Kirksey plans were only 0.2150% and 0.230%, respectively. Mem. Op., p. 7a.

and other areas and racial bloc voting, a district generally must be at least 65% black in population or 60% black in voting age population to provide black voters with an opportunity to elect candidates of their choice to public office.[7]

Plaintiffs filed their notice of appeal to this Court on June 15. On June 21 this Court denied plaintiffs' application for a stay and for interim relief pending appeal without opinion. *Brooks* v. *Winter*, No. A-1084, 50 U.S.L.W. 3998.

THE QUESTIONS ARE SUBSTANTIAL

This case directly poses the important question of whether a District Court is obliged by this Court's decisions to defer to the racial policies of a Voting Rights Act-covered state embodied in a plan objected to under Section 5, and to order into effect a plan which deprives black voters of the opportunity to elect candidates of their choice in all five districts, as opposed to a proposed plan which would give black voters an equal opportunity to elect candidates of their choice in one district.

The question is a substantial one, because the effect of the District Court's decision is to supplant the discriminatory, objected-to plan with a court-ordered plan which also dilutes black voting strength, although in a different manner. The District Court erroneously held that the decisions of this Court in *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982), and *White* v. *Weiser*, 412 U.S. 783 (1973), require this result. The District Court did not construe its mission to provide an effective remedy for the dilution of the objected-to plan, but rather to implement the same discriminatory racial policies which had been rejected by the Attorney General.

---

[7] Ex. P-1, p. 5, ¶ 16. See *Mississippi* v. *United States*, 490 F.Supp. 569, 575 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980). All references to exhibits are exhibits admitted in evidence in the District Court.

The proper scope of *Upham* is a critical issue which is likely to recur and which should be resolved by this Court. In a recent decision, a three-judge District Court, citing *Upham*, ordered into effect an Alabama legislative reapportionment plan to which the Attorney General had entered a preliminary Section 5 objection. *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982). The action of the District Court here in ordering into effect a 53.77% black district should also be contrasted with the recent decision of the District Court for the District of Columbia denying preclearance of a legislatively-enacted Georgia congressional redistricting plan with a 57.28% black congressional district for racially discriminatory motivation. *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. July 22, 1982).

If the District Court's decision is allowed to stand, minority voters whose voting strength is diluted in a legislatively-enacted plan will be left without an effective judicial remedy for the discriminatory state racial policy which precipitated the Attorney General's Section 5 objection.

I. THE DISTRICT COURT'S DETERMINATION TO IMPLEMENT A COURT-ORDERED PLAN WHICH EMBODIES THE RACIAL POLICIES OF THE OBJECTED-TO PLAN IS CLEARLY ERRONEOUS AND VIOLATES CONTROLLING PRECEDENTS OF THIS COURT.

A. The District Court's Decision to Adopt the Racial Policies of the Objected-To Plan Is Not Compelled by *Upham* v. *Seamon*, and Is Contrary to this Court's Rulings in *Upham*, *McDaniel* v. *Sanchez*, and *White* v. *Weiser*.

The District Court's decision to implement the Simpson plan was grounded upon its reading of *Upham* v. *Seamon*:

> We are guided by the Supreme Court's recent decision in *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982). In *Upham*, the Court clearly held that,

> in fashioning an interim reapportionment order, a district court must adhere to the state's political policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act. See also, *White* v. *Weiser*, 412 U.S. 783, 795, 37 L.Ed.2d 335, 346 (1973).

Mem. Op., pp. 11a-12a.

Both the Kirksey plans and the Simpson plan equalized the population among the districts by deviations of less than 0.2%, and preserved the incumbent congressmen in their respective districts. The District Court's ruling therefore turns primarily upon its determination that under *Upham* it was bound to follow Mississippi's racial policy embodied in S.B. 2001 of "establishment of two districts with 40% or better black population." *Id.* at 12a.

> However, we are bound by the legislative preference for two high black impact districts unless that determination violates constitutional or statutory mandates. We emphasize that it is not our function to substitute our judgment for the state's political program in this respect, absent federal invalidity. We find no federal bar to this aspect of the state's political objective.

Id. at 12a-13a.

The circumstances of *Upham* v. *Seamon* are strikingly different from those presented here. In *Upham*, the Attorney General objected to the district lines for two contiguous South Texas districts. Despite the fact that the Attorney General specifically approved the Voting Rights Act validity of the other 25 districts, the District Court redrew the boundary lines for four Dallas districts, which had been precleared by the Attorney General. This Court accepted the argument of the state that

> in the absence of any objection to the Dallas districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with

> respect to those districts, a court must defer to the legislative judgments the plans reflect . . .

71 L.Ed.2d at 729.

But *Upham* also indicates that judicial deference to state reapportionment policy is limited by "the substantive constitutional and statutory standards to which state plans are subject," *id.* at 730, and any remedy "must be determined on the basis of the substantive legal standards applicable to the state's submission," *id.* at 731.

Indeed, the action taken by the District Court here directly contradicts the relief to remedy the Section 5 objection granted by the District Court in *Upham, Seamon* v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982) (three-judge court), implicitly approved by this Court. In *Upham*, the Attorney General objected to the overconcentration of Mexican-Americans in one South Texas district, District 15, which was 80.4% Mexican-American, and which diluted Mexican-American voting strength in the adjoining new district, District 27, which was only 52.9% Mexican-American.[8] All three judges of the District Court agreed that it was "entirely appropriate for this Court to remedy, temporarily, those areas found objectionable under the Voting Rights Act so that congressional elections in Texas can proceed on schedule. 536 F. Supp. at 1028 (Parker, J., concurring in part and dissenting in part). The remedial plan ordered into effect by the District Court made District 15 72.2% Mexican-American and District 27 64.3% Mexican-American. *Id.* at 955. The District Court did not perceive the creation of two districts with substantial Mexican-American majorities as an unjustified "failure to defer to the State's choice" because it addressed "substantially the same problem that prompted the Attorney General of the

[8] Section 5 objection letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to David Dean, Texas Secretary of State, January 29, 1982, p. 2.

United States to interpose an objection to S.B. 1." *Id.* at 958 n. 41 (Johnson, J.).

On appeal, the District Court's plan redrawing these South Texas districts to remedy the dilution of the objected-to plan was not contested by appellants, and this portion of the District Court's plan was implicitly approved by this Court as "required by the nature and scope of the violation." 71 L.Ed.2d at 730.

Here, contrary to the proper action of the *Upham* court, the District Court felt compelled by this Court's *Upham* decision to embrace the very legislative policy of diluting black voting strength in majority white, 40% black districts which resulted in the Attorney General's Section 5 objection. The statistics contained in the court's opinion itself make clear that the basis of the Attorney General's objection was the state's policy of fragmenting and diluting the black population concentration in the Delta area to create five majority white congressional districts in which blacks constituted no more than 47.95% of the population. Mem. Op., pp. 6a-7a. District 2, which employed this 40% standard, was specifically cited in the objection letter. Appendix B, p. 28a.

The state's policy of avoiding the creation of a significantly majority black congressional district and diluting black voting strength to create districts "with 40% or better black population" therefore was part of "the nature and scope of the violation," *Upham*, 71 L.Ed.2d at 730, which the District Court was required to remedy, not defer to. In contrast to *Upham* which turned on the *absence* of any objection as the foundation for court deference, the District Court in this case cites *Upham* to ordain deference to the legislative policies which *precipitated* the Section 5 objection.

The controlling precedents of this Court—including *Upham*—clearly prohibit District Courts from implementing a court-ordered plan which embodies the legislative

racial policies underlying the districting which the Attorney General has determined violates the Voting Rights Act. As this Court held in *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981):

> [W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable. [Footnote omitted.]

In *McDaniel* this Court noted that in extending the Voting Rights Act, Congress intended that District Courts be governed by the administrative determinations of the Attorney General:

> Furthermore, in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.

S. Rep. No. 94-295, 94th Cong., 1st Sess. 17-18 (1975) (footnote omitted), quoted 452 U.S. at 149. The decisions of this Court make clear that the District Court is under no obligation to follow state policies found to be violative of constitutional or statutory guarantees:

> Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge. The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified.

White v. *Weiser*, 412 U.S. 783, 797 (1973).

The interposition of the Attorney General's objection to S. B. 2001 and the racial policies embodied in that plan define the substantive Voting Rights Act standard which necessarily governs the Mississippi District Court's

deliberations unless and until Mississippi demonstrates the absence of both discriminatory purpose and effect in the District of Columbia District Court. *City of Rome* v. *United States*, 446 U.S. 156 (1980). Thus, the District Court lacked authority to promulgate an interim plan which was based upon deference to the core of the legislative decision which was found to be unlawful under Section 5.

If the District Court's decision is allowed to stand, the protections of the Voting Rights Act could be rendered meaningless. Any covered state which has violated Section 5 by enacting a discriminatory plan to which an objection has been interposed would be free to implement its discriminatory state racial policies by means of court deference to them in fashioning a court-ordered plan. Minority voters, who are the victims of such discriminatory action, would be without an effective remedy for discrimination against them.

Because the District Court's selection of the Simpson plan was based on its finding that it more nearly satisfied the state's criterion of creating two 40% or better black districts, the District Court's order should be vacated and the case remanded to the District Court for the formulation of a remedy for the Section 5 violation in this case.

B. Under the Section 5 Preclearance Procedures of the Voting Rights Act, the District Court Was Without Jurisdiction to Consider the Validity of and Approve the State's Racial Policies Embodied in S.B. 2001.

As part of its basis for implementing the Simpson plan, the District Court considered the validity of Mississippi's majority white, 40% black rule embodied in S.B. 2001, recited the testimony given by the chairman of the Legislature's Joint Congressional Redistricting Committee that the policy was not malevolent, but benign (Mem. Op., p. 12a), and concluded that "the state's

policy of favoring 40% or better black population districts was legitimate" (*id.* at 14a).[9]

This determination is contrary to the Attorney General's objection to S.B. 2001 and to the history of congressional redistricting in Mississippi, *infra*, Section C. But, in any event, the Voting Rights Act decisions of this Court firmly establish that the validity of the racial policies behind S.B. 2001 is not for the District Court in Mississippi to determine, absent Section 5 preclearance. As this Court recently ruled:

> We held only last term that § 5 applies to any change "reflecting the policy choices of the elected representatives of the people," . . .

Hathorn v. *Lovorn*, —— U.S. ——, 50 U.S.L.W. 4664, 4667 n. 16 (1982), quoting *McDaniel* v. *Sanchez*, *supra*, 452 U.S. at 153. The policy determinations of Congress in enacting the Act "reflect a congressional choice in favor of specialized review—either by the Attorney General of the United States or by the United States District Court for the District of Columbia." *McDaniel* v. *Sanchez*, 452 U.S. at 151. Any consideration by the Mississippi District Court of the validity of the state's racial redistricting policy contradicts the rule firmly established in the Mississippi cases that under the Voting Rights Act the validity of such considerations is expressly "reserved by

---

[9] The District Court's findings on this issue ignore the fact that spreading black voters around among two or more districts so that blacks constitute only 40% or more of the district population is the hallmark of racial gerrymandering. See Section C, *infra*. In endorsing the legislature's racial theory of legislative redistricting, the District Court failed to take into account the stipulated proof of racially polarized voting, under which majority white districts with 40% black minorities are racially discriminatory against black voters. "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections because of their race." *Rogers* v. *Lodge*, 50 U.S.L.W. 5041, 5044 (U.S. July 1, 1982).

§ 5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia." *Perkins* v. *Matthews*, 400 U.S. 379, 386 (1971). See also, *Connor* v. *Finch*, 431 U.S. 407, 412 (1977); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Allen* v. *State Board of Elections*, 393 U.S. 544, 561 (1969).

C. Alternatively, the District Court Erred in Approving the State's Racial Policy of Creating Majority White, 40% Black Districts and Implementing that Policy in the Simpson Plan Because that Policy Is Rooted in Purposeful Racial Discrimination.

In placing its imprimatur upon Mississippi's policy of creating majority white, 40% black "high impact" congressional districts, the District Court disregarded the Attorney General's findings and the uncontradicted documented legislative history in the record below which showed that this policy was "rooted in racial discrimination" and was the product of "a long 'history' of bias and franchise dilution in the State's traditional drawing of district lines." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 3 (1972).

The stipulated and undisputed facts show that from 1882 to 1966 Mississippi retained a congressional district which encompassed the heavily black, northwest portion of the state commonly referred to as "the Delta." Each time the state lost a congressional seat because of population shifts—in 1932, 1952, and 1962—the Delta district was kept intact. May 13-14 Hearing Transcript ("Tr."), 20-30; Exs. P-1, P-2, P-3 through 12.

In 1960 the Delta congressional district (District 3) was 65.51% black in population. Ex. P-13. In 1962, the Mississippi Legislature combined the Second District, which was 59.29% black in population and 52.09% black in voting age population. *Id.* The 1962 plan, however,

was grossly malapportioned. Ex. P-1. During this period blacks were prevented from exercising any political power in congressional elections because of the state's

> long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics . . . would seem to show had been remarkably successful.

United States v. *Mississippi*, 380 U.S. 128, 135-36 (1965).

In 1965 Congress enacted the Voting Rights Act, and just as blacks were starting to register and vote, the Mississippi Legislature in 1966 redrew the congressional district lines. Tr. 30-32. The heavily-black Delta, a distinct geopolitical entity since 1882, was carved up among four of the five congressional districts, all of which were majority white in voting age population. Ex. P-2, Ex. P-13A. This was the point at which Mississippi instituted its majority white, 40% black congressional redistricting policy. Three of the districts were in the 40% or better range, and one district was 51.35% black in population, but 44.32% black in voting age population. Ex. P-13A.

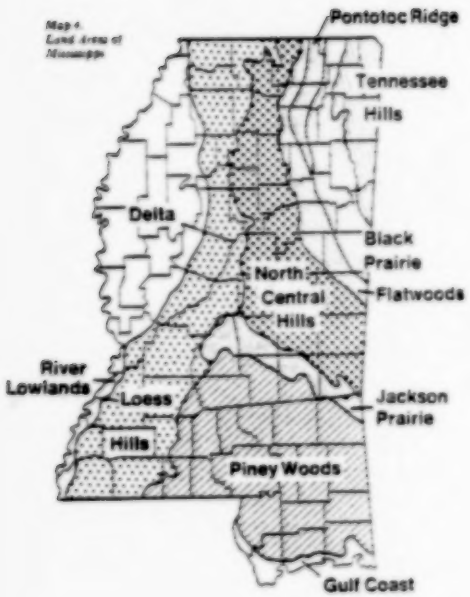
Newspaper accounts of the legislative debate at the time, the only available source of legislative history,[10] indicate that race was the main issue in the legislative debate, and that the district realignment was racially motivated to fragment and dilute black voting strength:

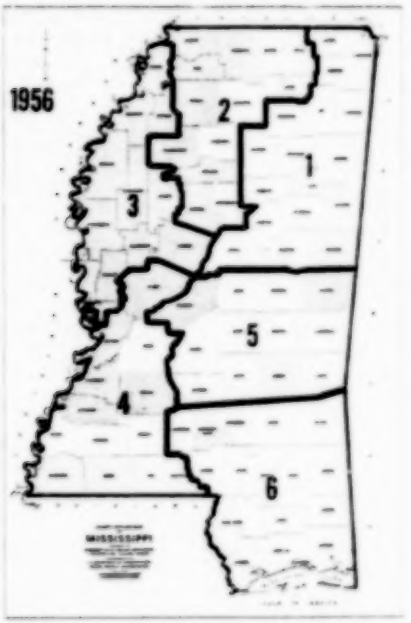
> Rep. Thompson McClellan of Clay charged in the House the districts were set up "so there shall not be a majority of certain groups in a district. The courts will consider a similar case and they'll throw this out. We will have congressmen elected at-large or by districts fixed by the U.S. Supreme Court."

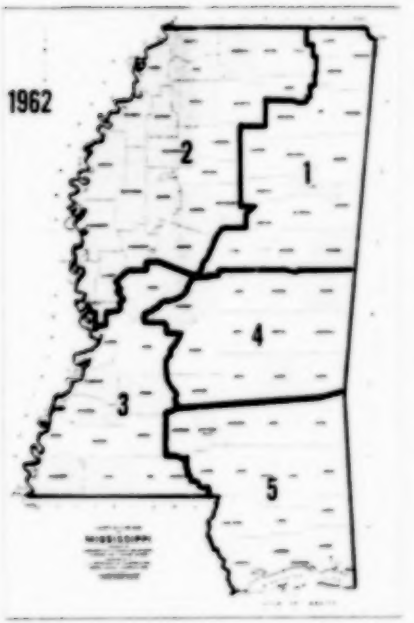
---

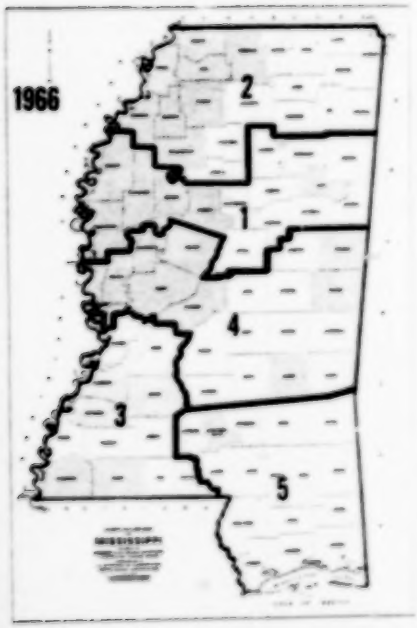
[10] Mississippi has stipulated that, because there is no official legislative record, these newspaper reports are admissible in evidence to show legislative history, and they were admitted in evidence below. Ex. C-1, p. 8.

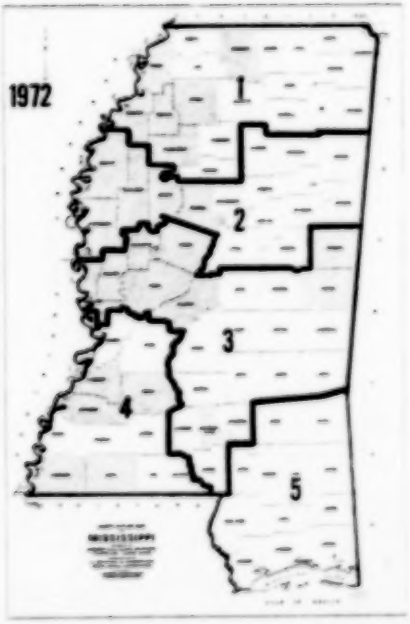
MISSISSIPPI CONGRESSIONAL DISTRICT LINES, 1956 TO 1981

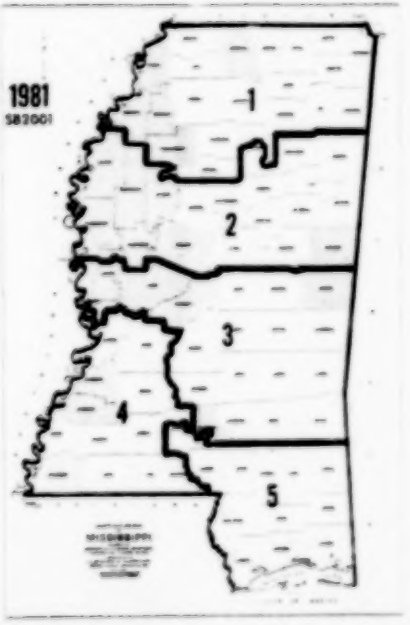












(MAJORITY BLACK COUNTIES SHADED)

MISSISSIPPI CONGRESSIONAL DISTRICTS—1960 to 1981
(Exs. P-13, 13A).

A. 1956 PLAN—1960 CENSUS

District	Total	Black	(%)
1	364,963	117,663	(32.23%)
2	237,879	118,049	(49.62%)
3	370,554	242,759	(65.51%)
4	459,186	138,690	(30.20%)
5	295,072	121,540	(41.18%)
6	451,565	107,039	(23.70%)

B. 1962 PLAN—1960 CENSUS

District	Total	Black	(%)	Black VAP	(%)
1	364,963	117,663	(32.24%)	53,810	(25.89%)
2	608,441	360,780	(59.29%)	159,432	(52.09%)
3	460,100	213,573	(46.41%)	101,790	(40.55%)
4	295,072	121,540	(41.19%)	64,550	(39.40%)
5	449,565	106,652	(23.72%)	50,330	(20.54%)

C. 1966 PLAN—1960 CENSUS

District	Total	Black	(%)	Black VAP	(%)
1	449,361	230,797	(51.36%)	103,710	(44.32%)
2	427,468	184,424	(43.14%)	82,198	(34.72%)
3	428,447	194,782	(45.46%)	93,071	(39.65%)
4	423,300	203,553	(48.09%)	100,603	(44.13%)
5	449,565	106,652	(23.72%)	55,330	(20.54%)

D. 1972 PLAN—1970 CENSUS

District	Total	Black	(%)	Black VAP	(%)
1	433,825	154,085	(35.51%)	69,782	(28.59%)
2	440,689	202,428	(45.93%)	94,366	(40.99%)
3	445,723	179,936	(40.36%)	85,644	(33.77%)
4	444,776	191,739	(43.11%)	92,260	(36.75%)
5	451,981	87,582	(19.38%)	41,091	(16.19%)

E. 1981 PLAN—1980 CENSUS—S.B. 2001

District	Total	Black	(%)
1	504,107	150,195	(29.79%)
2	504,024	241,668	(47.95%)
3	504,237	168,336	(33.38%)
4	504,123	228,491	(45.32%)
5	504,147	98,516	(19.54%)

> "This patently was drawn in a manner to devalue the vote of a certain group of people."
>
> Legislators frequently refrain from using the word "Negro," and refer to Negroes as "a certain group."
>
> And Rep. Odie Trenor of Chichasaw also charged the bill was an effort to split up the Negro vote and termed the bill a gerrymander attempt.

Jackson *Clarion-Ledger*, Jan. 19, 1966 (Ex. P-1, Attachment F-7).

> An issue proponents had hoped to keep "under wraps" to shelter the far-reaching aspects of the bill was opened up on the floor by two opponents. It was the obvious five-way split of the Negro population to minimize its influence at the polls. Although that was an obvious purpose in the realignment of the counties in the Williams bill proponents had sought to keep it from arising on the floor. They realize once it was brought into the open it would provide the arguments desired by those reportedly planning to challenge it before the United States Supreme Court.

Memphis *Commercial Appeal*, Jan. 16, 1966 (Ex. P-1, Attachment F-6).

All five districts of the House-passed bill were majority white in population. NAACP Field Secretary Charles Evers described the bill as "discriminatory and obviously designed to gerrymander districts to split up Negro voting strength." Jackson *Clarion-Ledger*, Jan. 19, 1966 (Ex. P-1, Attachment F-7).

The Mississippi Senate, fearing the House-passed bill would not stand up in court, passed a bill which split up the Delta, but which contained one district with a slight 55-56% black population majority. Ex. P-1, p. 11, ¶ 43. The House refused to accept the Senate bill, and instead, enacted a Senate-rejected plan, which created five majority white districts. *Jackson Daily News*, April 7,

1966 (Ex. P-1, Attachment F-15). The House-Senate conference committee was deadlocked for several weeks. Ex. P-1, pp. 12-14. Finally, one day before the qualifying deadline, both houses passed a compromise plan which contained one 51.36% black majority district, but it too was described as racially discriminatory.

> Another amendment was offered by Rep. Thompson McClellan of Clay, who argued that the new House plan could not stand up in court.
>
> "Any bill that shows discrimination against a certain race," he said, "they'll knock down. You are trying to take two white counties in northeast Mississippi out of the 2nd District, and put a heavy Negro populated county in. They will say this bill is fraught with discrimination."
>
> But he, too, lost.

Jackson Daily News, April 7, 1966 (Ex. P-1, Attachment F-15).

The 1966 plan was never submitted for Section 5 review. Ex. C-1, pp. 5-6.[11]

In 1972 the Mississippi Legislature enacted a new congressional redistricting plan based on the 1966 plan; only five counties were realigned. Ex. P-2; Tr. 32-33. The 1972 plan also divided the heavily black Delta area among four of the five districts, and this time all five districts were majority white in both population and vot-

---

[11] In 1966 a Mississippi District Court held that a group of black voters failed to sustain their burden of proving that the congressional redistricting plan was racially motivated, holding only that "the solemn acts of the Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports." *Connor* v. *Johnson*, 279 F. Supp. 619, 623-24 (S.D. Miss. 1966) (three-judge court), *aff'd mem.*, 386 U.S. 483 (1967). The District Court did not determine, however, that the 1966 plan did not have a discriminatory effect, and did not apply the Section 5 standard under which the state would have had the burden of proving that the 1966 plan was not racially discriminatory in purpose or effect.

ing age population. Ex. P-13A. Three of the districts (Districts 2, 3, and 4) were between 40% and 46% black. *Id.* All efforts to restore a Delta district were defeated, and the 1972 plan was denounced in the Mississippi Legislature as an extension of the "racially motivated" 1966 plan designed to dilute black votes.

> Rep. Robert Clark of Ebenezer, the lone black member of the legislature, charged the plan was simply an extension of a present congressional plan which was "racially motivated" and designed to "dilute" black votes.
>
> Clark was referring to the present alignment of congressional districts.
>
> An alternative plan was offered by Clark to sharply revise the five districts, but it was rejected 102-7. Several other amendments also were defeated.

Tupelo Daily Journal, February 18, 1972 (UPI wire story) Ex. C-1, Binder 6, Attachment Y). Other legislators denounced the new district lines as "outlandishly drawn," "an outrageous outline," and "a monster." Jackson *Clarion-Ledger*, Feb. 18, 1972 (*id.*). On the Senate floor, Sen. Ebb Horton stated that "this House plan makes the Third District look like an old duck with its foot turned backwards." Jackson *Clarion-Ledger*, Feb. 24, 1972 (*id.*). Amendments to restore a Delta district which had population variances lower than the enacted plan were defeated in the Senate.

> Much opposition to these plans centered upon the provision for a "Delta" district. Many counties in that area had top-heavy black majorities.

Id. The 1972 plan was submitted to the Justice Department, and no objection was interposed. The Attorney General determined in his 1982 objection letter:

> However, the Attorney General's decision was, as expressly stated in the 1972 no objection letter, not

> based on an independent review of the merits of the plan under Section 5, but rather, rested solely on the view held at that time that the decision in *Connor v. Johnson*, *supra*, was binding on the Attorney General.

Appendix B. p. 26a.

During the public hearings on S.B. 2001, the 1981 plan, the Mississippi NAACP, all 17 black members of the Mississippi Legislature, and all of the black witnesses who testified at the eight public hearings held throughout the state testified in favor of a majority black congressional district. Tr. 239-40. All proposals to create a congressional district with a substantial black majority were defeated. Ex. P-1, p. 25; Ex. C-1, Binder 2. The chairman of the Legislature's Joint Congressional Redistricting Committee testified at the trial in this case that the Mississippi Legislature made a conscious decision not to create a majority black district because "it would serve the narrow political interest of a small group of black politi .ans." Tr. 238-39.

On the basis of this evidence, which was disregarded by the District Court in its decision, the District Court erred in approving and implementing Mississippi's policy of creating majority white, 40% black congressional districts.

II. THE DISTRICT COURT-ORDERED PLAN VIOLATES THE GUIDELINES ESTABLISHED BY THIS COURT IN *CONNOR* v. *FINCH* AND FAILS TO REMEDY BLACK VOTE DILUTION.

In *Connor* v. *Finch*, 431 U.S. 407 (1977), the Mississippi legislative reapportionment case, the Court held that the District Court's task in devising a court-ordered plan

> is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner "free from any taint of arbitrariness or discrimination."

431 U.S. at 415, quoting *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964). In particular, the District Court must take care to avoid "challenges based upon claims that the plan's apportionment of some districts impermissibly dilutes Negro voting strength." *Id.* at 421.

The Court specifically identified two types of dilution of black voting strength to be avoided in court-ordered plans, both of which typify the salient characteristics of racial gerrymandering. In the first, the Court criticized the fragmentation of black voting strength through "five oddly shaped beats that extend from the far corners of the county in long corridors that fragment the city of Jackson, where much of the Negro population is concentrated." *Id.* at 423. This was the gerrymandering technique employed by the Mississippi legislature in the plan objected to by the Attorney General.

But the court also identified a second, equally invidious form of racial gerrymandering which combined black population concentrations with more populous white concentrations to create districts with white voting majorities. *Id.* at 424-25.[12] The Court criticized the District

---

[12] In *Mississippi* v. *United States*, 490 F. Supp. 569, 581-82 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980), the District Court held:

> 14. In a single-member districting plan, black voting strength may be unconstitutionally and impermissibly diluted, minimized, and cancelled out (1) when heavy black population concentrations are unnecessarily fragmented and dispersed, and (2) when black population concentrations [are unnecessarily combined with white population concentrations] to deny black voters the opportunity to elect candidates of their choice. *Connor* v. *Finch*, 431 U.S. 407, 421-25 (1977); *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 149 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Robinson* v. *Commissioners Court, Anderson County, Texas*, 505 F.2d 674, 679 (5th Cir. 1974); *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621, 622-24 (5th Cir. 1974); *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court).

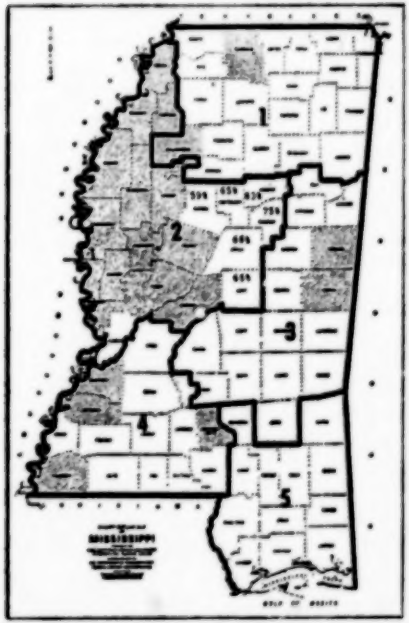
Court plan which combined black population concentrations in two contiguous, majority black counties, Jefferson and Claiborne counties, with adjoining majority white counties and parts of counties "to make a white majority senatorial district" and "an irregularly shaped senatorial district with a slight Negro voting-age majority" in the face of a proposed alternative which would have kept the black population concentration intact and would have made a compact district with a 55% Negro voting age population majority. *Id.*

In adopting the Simpson plan, the District Court here rejected the clear mandate of *Connor* v. *Finch*. While the court-ordered plan reunites the Delta counties, District 2 unnecessarily reaches from the Mississippi River all the way across to the east-central portion of the state, and links the heavily black Delta area with the six predominantly-white, Hill counties of Attala, Carroll, Choctaw, Leake, Montgomery, and Webster, which, taken together, are 65% white.[13] The resulting district is 53.77% black in population, Mem. Op., p. 8a, but majority white in voting age population (*supra*, p. 7). By running the lines of District 2 horizontally in an east-west direction, the Simpson plan retains one of the prime features of the objected-to plan. Appendix B, Section 5 objection let-

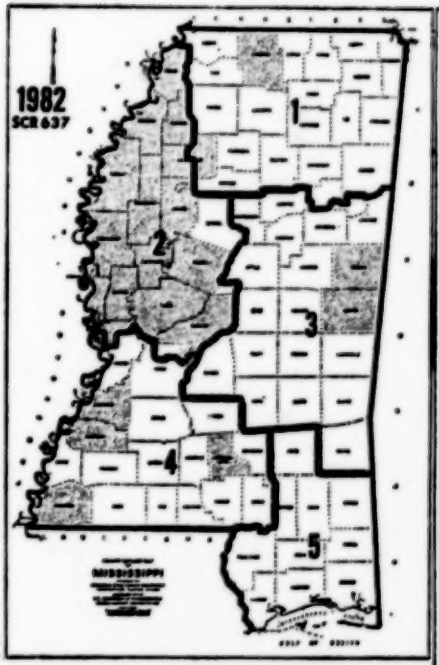
---

[13] MAJORITY WHITE HILL COUNTIES JOINED TO DELTA DISTRICT IN SIMPSON PLAN

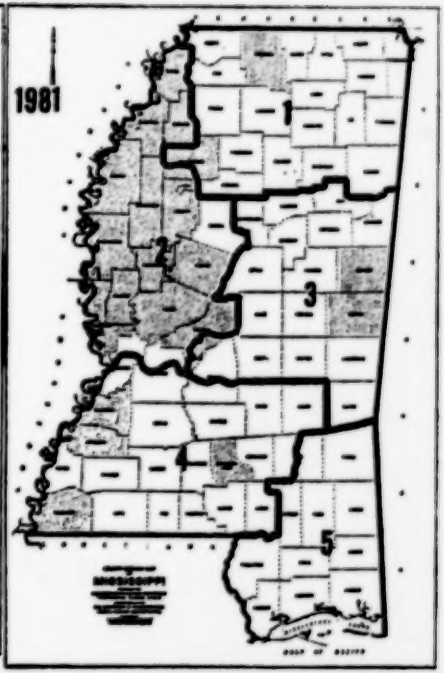
County	Total Population	White Population	% White Population	% White VAP
Attala	19,865	12,052	60.67%	65.79%
Carroll	9,776	5,332	54.54%	59.43%
Choctaw	8,996	6,447	71.67%	75.36%
Leake	18,790	12,989	60.96%	65.79%
Montgomery	13,366	7,883	58.98%	64.57%
Webster	10,300	8,265	80.24%	83.07%
	81,093	52,968	65.32%	



Map showing boundaries of Simpson plan adopted by the District Court. Majority black counties (1980 Census) are shaded. Percentages are white voting age population percentages (1980 Census).



Brooks Plaintiffs' Plan
(Kirksey, 1982)



Brooks Plaintiffs' Alternative
(Kirksey, 1981)

ter, p. 27a. This district also has a large land area of 11,915 square miles (Tr. 269), impeding effective campaigning.

Plaintiffs' expert witness at trial testified (Tr. 272), and the District Court did not find otherwise, that the Simpson plan denies black voters the opportunity to elect candidates of their choice in any of the five districts. By combining these heavily white Hill counties with the majority black Delta counties, this plan dilutes black voting strength just as the *Connor* v. *Finch* court-ordered plan diluted black voting strength in Jefferson and Claiborne counties by combining them with adjacent majority white areas.

The two Kirksey plans, by contrast, avoid this dilution of black voting strength by combining the majority black Delta counties with adjacent majority black areas of Hinds County and Jackson, forming majority black districts which are 64.37% black and 65.81% black, respectively. Mem. Op., pp. 7a-8a. The attached maps show that the Kirksey plan districts are more compact and regular in shape, particularly in the preferred plan, than the Simpson plan districts. District 2 in the Kirksey preferred plan is compact and has a land area of only 9,361 square miles (Tr. 269). The expert testimony at trial was that District 2 in each of the Kirksey plans would give black voters an opportunity to elect candidates of their choice (Tr. 270).

Given the District Court's holding that "the essence of the dispute centers around claims of dilution of black voting strength," Mem. Op., p. 7a, the lower court failed adequately to explain why it preferred a plan which denied black voters an opportunity to elect candidates of their choice over one which did. Certainly, the District Court's determination was governed by its misconception that it was bound by the state's policy in favor of majority white, 40% black districts. But the District Court also labored under the legally erroneous misconception

that its remedial authority to correct the statutory violation in this case precluded approval of a 65% majority black district, and that any plan which contained such a district was a racial gerrymander. Mem. Op., p. 14a. This view is totally inconsistent with this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), in which the Court recognized the "congressional decision to authorize the use of race-oriented remedies" to counter the effects of vote dilution following a Section 5 objection. *Id.* at 176 (Brennan, J., concurring). There the Court specifically approved the creation of a 65% black majority district to give minority voters an opportunity to participate on an equal basis in the electoral process. *Id.* at 164-67 (plurality opinion).[14]

Here, the creation of a 65% black district constitutes "a reasoned response to the problem of past discrimination." *Id.* at 184 (Burger, C.J., dissenting). As the Attorney General noted in his objection letter, Mississippi had a 65% black majority Delta district prior to the passage of the Voting Rights Act. Subsequent congressional redistrictings were designed to eliminate that 65% black district, and this gerrymandering, the evidence shows, was the direct product of purposeful racial discrimination. The Attorney General in his objection letter selected the pre-Act 65% district as the benchmark by which the retrogression of black voting strength prohibited by the Voting Rights Act, *Beer* v. *United States*, 425 U.S. 130 (1976), is to be measured, and the District Court in implementing a remedial plan is bound by that determination. *McDaniel* v. *Sanchez, supra.*

The District Court also criticized the Kirksey plans as

> repugnant to valid state policies inasmuch as they erode the electoral bases of incumbent congressmen in Districts 2 and 4, contain a larger population

---

[14] See also, *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 151 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977).

> variance than the Simpson amendment, and disregard the state's policy of creating two high black impact districts.

Mem. Op., p. 14a. The criticisms are insubstantial and should be rejected. The Kirksey plan districts generally encompass the same geographical areas as the Simpson plan districts. Further, both Kirksey plans satisfy the state's policy (Mem. Op., p. 6a) by preserving incumbent congressmen in their respective districts (Tr. 47). This Court has ruled that preserving the reelection changes of incumbents is a valid criterion only if pursuit of that goal is not tainted with unlawful discrimination, *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), which the Simpson plan is. No incumbent has a federal right to be reelected. See, e.g., *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 456 (E.D. La. 1971) ("those elected to office for specific terms do not thereby acquire a vested interest in the office. . . . The office holder has no constitutional right to represent anyone except for the specific term for which he is elected."). Further, there is no significant difference in the population deviations of the Kirksey plans (0.2150% and 0.230%) and the Simpson plan (0.2141%). See *Karcher* v. *Daggett*, 50 U.S.L.W. 3767 (U.S. March 15, 1982) (Brennan, J., in chambers). The last criticism regarding the "black impact" districts is legally insufficient, *supra*, Sections B, C.[15]

In selecting the Simpson plan, the District Court violated the mandate of this Court expressed in *Connor* v. *Finch* "to make every effort not only to comply with

---

[15] The District Court also stated that it preferred the Simpson plan because it split only two sparsely settled counties, and maintained District 2 as a rural area. Mem. Op., pp. 15a-16a. The chairman of the Joint Committee admitted that combining urban and rural areas in congressional districts was unavoidable and was part of S.B. 2001, the legislatively-enacted plan, Tr. 243; S.B. 2001 itself divided four counties. The preference for intact counties is therefore not a compelling state policy, nor is it a sufficient criterion for court preference for the Simpson plan.

established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." 431 U.S. at 425. This furnishes a separate and independent ground for vacating the District Court's selection of that plan. It is therefore appropriate for this Court to provide the District Court with guidance in the formulation of a remedy to avoid new claims for impermissible racial vote dilution. Cf. *Connor* v. *Finch*, 431 U.S. at 422; *Chapman* v. *Meier*, 420 U.S. 1, 26 (1975).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM L. ROBINSON
*FRANK R. PARKER
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants [16]

*Counsel of Record

---

[16] Appellants gratefully acknowledge the valuable assistance of Samuel Issacharoff, a student at Yale Law School, in the preparation of this Jurisdictional Statement.

APPENDIX A

District Court Decision and Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

Plaintiffs

v.

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

(June 8, 1982)

Before CLARK, Circuit Judge, and KEADY and SENTER, District Judges.

PER CURIAM:

Plaintiffs bring class actions on behalf of Mississippi residents and registered voters and the state's black residents and voters to (1) enjoin enforcement of the state's 1981 congressional redistricting plan until it is precleared under § 5 of the Voting Rights Act (42 USC § 1973c); (2) prohibit further use of Miss. Code Ann. § 23-5-223 (1972), the state's existing congressional plan, because of population malapportionment allegedly violative of Art. 1, § 2 and the fourteenth amendment to the United States Constitution; and (3) secure a court-ordered plan for the 1982 elections for members of the United States House of Representatives, and thereafter until changed by law. Defendants are the state's governor, attorney general, secretary of state, state board of election commissioners and the Republican and Democratic state executive committees which are responsible for conducting the primary and general elections for the United States House of Representatives in Mississippi.

The court has jurisdiction pursuant to 28 USC §§ 1331 and 1343 and 42 USC § 1973j(f), and a three-judge district court has been properly convened pursuant to 28 USC § 2284.

In August 1981 the Mississippi Legislature enacted S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, for redistricting the state's five congressional districts and thereafter submitted it to the Attorney General of the United States for § 5 preclearance. After requesting additional information, the Attorney General interposed timely objection on March 30, 1982. Although the state legislature was in session when the objection was received, it adjourned several days later

without enacting another plan or further attempting to obtain preclearance from the Attorney General. Instead, on April 7, the state filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance of S. B. 2001. Mississippi v. Smith, No. 82-0956. This court has been notified that the declaratory judgment action, in which plaintiffs have intervened, will not be heard until mid-July. Since by Mississippi law, the 1982 congressional primaries were set for June 1 with runoff primary June 22, this court on April 26 found it necessary to order indefinite postponement of the current year's congressional primary pending expedited hearing on issues relevant to formulation of an interim court-ordered plan.

The parties are in agreement that the present circumstances require the court to adopt an interim redistricting plan effective until S. B. 2001 is precleared or an alternate plan is enacted by the state legislature and precleared under § 5. Admittedly, Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S. B. 2001 is a change in standards, practices or procedures with respect to voting within the meaning of § 5. The parties, however, vigorously disagree on what plan should be adopted by the court as an interim congressional redistricting plan.

During a two-day hearing on May 13 and 14, the court received stipulations, oral and documentary evidence and heard oral argument. Briefs of all concerned parties having been filed, we incorporate herein findings of fact and conclusions of law required by Rule 52(a), F. R. Civ. P.

I.

According to the 1980 official census, Mississippi has a total population of 2,520,638, of which approximately 35% are black. Since the state elects five members of the United States House of Representatives, the norm, or ideal population size for a congressional district is 504,-

128. Because of notable population shifts that have occurred throughout the state since 1970, the districts formed by the existing 1972 plan have a total population variance of 17.6%. The following table reflects the 1980 population, existing extent and percent of deviation, and percentage of minorities in the five 1972 districts:

Dist. No.	Total Pop.	Deviation	% Deviation	Black %
1	495,709	8,419	−1.67	29.90
2	460,780	43,348	−8.60	45.25
3	514,218	10,090	+2.00	37.87
4	500,329	3,799	−0.75	45.37
5	549,602	45,474	+9.02	19.78

In recognition of this disparity, the legislature in 1980 established a joint Senate-House Committee for Congressional Redistricting (Joint Committee), chaired by Representative Thomas H. Campbell, III, which converted census population data into the state's election precincts, conducted eight public hearings around the state and received the views and proposals of interested groups and individuals. Included among the submitted proposals were a number of plans advocated by legislators and citizens of both races. The plans submitted by blacks proposed joining the black majority counties in the northwest portion of the state known as the "Delta area" to other territory to create a black majority district, ranging from 52.1% to 65.81%.[1]

---

[1] The Mississippi Delta consists of 19 Delta and part-Delta contiguous counties as follows: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Yazoo. This is a distinct geographical area of the state traditionally featuring an agricultural economy concerned with flood control of the Mississippi River. The geography of the Delta has been colorfully and somewhat accurately described as "beginning in the lobby of the Peabody Hotel at Memphis, Tennessee, and ending at Catfish Row in Vicksburg, Mississippi." Since early times,

The Joint Committee recognized that the population variances had to be eliminated, but a majority of its members concluded this could be satisfactorally accomplished without diluting black voting strength by rearranging district lines to avoid incumbent congressmen from running against each other and by transferring only six counties and portions of four counties across district lines. Although Mississippi's congressional districting plans from 1882 to 1966 had contained a district encompassing most of the Delta counties, the committee did not feel obligated to voluntarily create a black majority district with a configuration different from the 1972 lines that had been previously precleared.[2]

The record further reflects that the Joint Committee disapproved any major change of the district lines and recommended a plan, the essence of which was enacted by the legislature as S. B. 20001 [sic], which achieved a population variance of .0422 by splitting four counties into adjacent districts (K-27). The stipulated data as to the total population, deviation, percentage of deviation, and percentage of total minority population[3] in the S. B. 2001 districts follow:

---

concentrations of blacks have resided in the Delta area. In fact, of the 21 black majority counties in Mississippi, 14 are located in the Delta.

[2] In 1966, the legislature first adopted a plan dividing the north and north-central portions of the state by drawing east/west lines generally across the state which segmented black majority Delta counties into three districts. Civil rights plaintiffs' challenge of the plan as a racial gerrymander violative of the fifteenth amendment was turned down in Connor v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), aff'd. 386 US 483, 18 L Ed 2d 224 (1967). The 1966 plan was in fact never submitted and precleared in accordance with § 5. In 1972, the legislature substantially reenacted the 1966 plan, adjusting only for population variances. On May 10, 1972, the Attorney General precleared the 1972 act, which was utilized without challenge for five congressional elections.

[3] Black voting age population is approximately 5% lower than total population figures.

District	Total Population	Deviation	% Deviation	Black %
1	504,107	− 21	−.0042	29.79
2	504,024	−104	−.0206	47.95
3	504,237	+109	+.0216	33.38
4	504,123	− 5	−.0010	45.32
5	504,147	+ 19	+.0038	19.54

S. B. 2001 was objected to by the Attorney General on the ground it divided the black majority Delta and part-Delta counties among Districts 1, 2 and 3 rather than concentrating them in a single district and concluded there had been unlawful dilution of minority voting strength.[4] The Attorney General was of the view that the legislature's reliance upon the 1972 precleared plan was misplaced, and stated that while no objection to the 1972 plan was timely interposed, this was the result of an er-

---

[4] The Attorney General's objection letter stated in part:

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2 and 3 of the reapportionment plan have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, therefore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

roneous determination by his office that the Supreme Court's summary affirmance in Connor v. Johnson, 386 US 483, 18 L ed 2d 224 (1967), was entitled to deference as to the § 5 issues.

Since it is apparent that the population deviations in congressional districts can be easily alleviated, the essence of the dispute centers around claims of dilution of black voting strength. Plaintiffs urge the court to adopt an interim plan with one district containing approximately 65% black majority population. To achieve this purpose, they have submitted two proposals, both of which were devised by Senator Henry J. Kirksey, a black legislator. The primary Kirksey plan (K-30) has a 64.37% black majority district and a total population variance of .2150%. This plan splits five counties, including populous Hinds County, from which a portion of the City of Jackson is combined with 14 Delta and part-Delta counties or segments thereof and with additional counties to form the black majority district. The following table presents the data concerning this plan.

District	Total Population	Deviation	% Deviation	% Blacks
1	504,219	+ 92	+.0182	25.60
2	503,436	−691	−.1371	64.37
3	504,530	+403	+.0799	32.49
4	504,035	− 92	−.0182	33.83
5	504,418	+291	+.0577	19.75

The "fall-back" Kirksey plan (P. Ex. 15) urged by plaintiffs has a 65.81% black majority district and a total population variance of .230%; it splits five counties, including Hinds County, which is divided among three districts. The majority black district in this plan combines portions of the Cities of Jackson and Vicksburg with 15 Delta and part-Delta counties, or segments thereof. Pertinent data on the plan follow:

District	Total Population	Deviation	% Deviation	Black %
1	503,642	−486	−.096	25.72
2	504,926	+798	+.158	65.81
3	503,762	−366	−.072	30.36
4	504,261	+133	+.026	33.70
5	504,047	− 81	−.016	20.33

In addition to the two Kirksey plans, the Joint Committee had before it many other plans submitted by various legislators and citizens, including several plans developed by the committee staff on motion of Representative James C. Simpson, which resulted in a plan referred to as the "Simpson amendment" (K-26). This plan, urged by AFL-CIO, as amicus curiae, has a total deviation of .2141%, and contains a district (District 2) which combines 15 Delta and part-Delta counties with six eastern rural counties to produce a 53.77% black majority district. Another district (District 4) has a 45.25% black district. The Simpson amendment only splits two rural counties and received considerable support in a floor vote occuring in the state House of Representatives. Miss. House Journal, Extraordinary Sess. 1981, p. 30. This plan is depicted below.

District	Total Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	503,760	−368	−.0729	31.23
4	503,893	−235	−.0466	45.25
5	503,617	−511	−.1013	19.84

Other plans considered but rejected by the legislature have not been urged for adoption by this court. The state officials, however, urge implementation as an interim plan of S. B. 2001, the existing 1972 redistricting plan, or a plan to be drawn by the court only slightly modifying either one of the preceding two.

II.

All parties agree that under § 5 and decisional precedent, this court serves only a limited function in congressional redistricting cases. Our task becomes an "unwelcome obligation" to prescribe an interim plan which will be effective merely until a redistricting plan adopted by the state can lawfully be used in its place, i.e., until either the District of Columbia court renders declaratory judgment upholding S. B. 2001 or the Mississippi legislature enacts another redistricting plan which is precleared under § 5. Moreover, notwithstanding a suggestion in McDaniel v. Sanchez, —— US ——, 68 L ed 2d 724, 739 (1981), that a federal district court should fashion its own plan, this court lacks the time, ability, and record basis to independently create a plan which could be implemented with sufficient promptness to allow the orderly conduct of the 1982 congressional primary and general elections. These limitations thus require us to choose from among the several plans urged for adoption in these proceedings. *Cf.* Terrazas v. Clements, —— F. Supp. ——, slip op. at 13-14 (N.D. Tex., March 24, 1982) (three-judge court).

Mississippi is precluded by the express terms of § 5 from implementing S. B. 2001 so long as it remains unprecleared. *See* Allen v. State Board of Elections, 393 US 544, 22 L ed 2d 1 (1969); Connor v. Waller, 421 US 656, 44 L ed 2d 486 (1975); Dotson v. City of Indianola, 521 F. Supp. 934 (N.D. Miss. 1981) (three-judge court). Section 5, however, does not by its terms prohibit a federal district court from utilizing, on an interim basis, an unprecleared plan. Indeed, it would be a rare case in which a federal court, compelled to devise an interim redistricting plan, would have opportunity to place into effect a plan that had been precleared under § 5. Although circumstances might arise in which a federal court could order, on an interim basis, implementation of an unprecleared legislative plan, we conclude that any action by

this court to so order S. B. 2001 into effect would be an injudicious exercise of our equitable remedial power. We base this view on several factors indisputably present in this case.

When S. B. 2001 was submitted, it was specifically objected to by the Attorney General, who concluded that it violated § 5. Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General. Perkins v. Matthews, 400 US 379, 27 L ed 2d 476 (1971). The proceedings under that Act which the State of Mississippi has instituted in the District Court of the District of Columbia will determine whether S. B. 2001 passes statutory muster for permanent use. It would be both inappropriate and unseemly for us to implement on a temporary basis the plan which those proceedings seek to preclear since we have other plans which will allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards. For these reasons the court rejects the defendants' suggestion that S. B. 2001 may be used on an interim basis. We expressly refrain from any action which may be viewed as indicating a position on either side of the issues pending in the District Court for the District of Columbia.

As to the existing 1972 congressional plan, the command of Art. 1, § 2 of the United States Constitution is that representatives be chosen "by the People of the several States." That article permits only those population variances among congressional districts that are "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Kirkpatrick v. Preisler, 394 US 526, 531, 22 L ed 2d 519, 525 (1969); Wesberry v. Sanders, 376 US 1, 11 L ed 2d 481 (1964). Under admitted facts, the state's existing plan with a 17.6% population variance renders it grossly malapportioned, and since it is readily apparent that this degree

of malapportionment is not unavoidable, we declare it to be unconstitutional, and plaintiffs are entitled to summary judgment on that issue as a matter of law.[5] Since plans with substantially lower population variances are available for use, implementation of the 1972 plan, even on an interim basis, would be without justification, and defendants' contention that the 1972 plan be used temporarily is not constitutionally permissible.[6] Accordingly, our decision is narrowed to consideration of the two Kirksey plans and the Simpson amendment proposal.

In determining which plan to place into effect as an interim plan, we must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Connor v. Finch, 431 US 407, 414, 52 L ed 2d 465 (1977). Moreover, *McDaniel*, *supra*, compels us to consider § 5 criteria. Thus, any plan adopted by this court as a temporary method of ensuring upcoming elections cannot violate Art. 1, § 2, the fourteenth amendment, or the Voting Rights Act. In particular, such a plan must satisfy the one person, one vote rule and avoid any dilution of minority voting strength. The three plans before us comply with these federal considerations and no tenable argument could otherwise be made. Since federal standards are met, we must now analyze each plan in light of the state's political policies.

We are guided by the Supreme Court's recent decision in Upham v. Seamon, —— US ——, 71 L ed 2d 725 (1982). In *Upham*, the Court clearly held that, in fashioning an interim reapportionment order, a district court

---

[5] *See Kirkpatrick*, *supra* (invalidating plan with variance of 5.97%) and Wells v. Rockefeller, 394 US 542, 22 L Ed 2d 535 (1969) (variance of 13.1% invalid).

[6] This is not a case such as *Wells*, *supra*, and Kilgarlin v. Hill, 386 US 120, 17 L ed 2d 771 (1967), wherein the courts were required, because of exigent circumstances, to implement malapportioned redistricting plans. In the case sub judice, plans with much lower population variance are readily available.

must adhere to the state's political policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act. *See also*, White v. Weiser, 412 US 783, 795, 37 L ed 2d 335, 346 (1973). As adduced at trial, the state's primary political policies reflected in the passage of S. B. 2001 may be summarized as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. As to the latter policy, the majority of the Joint Committee and legislature subscribed to the belief that a plan with two minority districts containing at least 40% black population was preferable to a plan that sacrificed two such "high impact" minority districts for one district with a significant black majority. The prevailing legislative view was that in order to ensure a congressman's responsiveness to the needs and interests of black citizens, the district should be at least 40% black whenever possible; any lesser percentage, in its view, would likely result in insensitivity to the black constituency.

In determining the validity vel non of these state policies, we note the Attorney General's conclusion that the state's action in drawing lines for Districts 1, 2 and 3 from east to west violated § 5 by unlawfully diluting black voting strength. Since the validity of that determination lies at the heart of the proceedings now pending in the District Court of the District of Columbia, we simply accept that decision for the purposes of this ruling without any indication of a view on its merits. No one argues that the second and third policies offend either the Constitution or the Voting Rights Act. As to the last factor, plaintiffs contend only that one 65% black majority district would better serve the interests of blacks than would two 40% or better black population districts since a 65% black district is more likely to assure election of one black congressman. However, we are bound by the

legislative preference for two high black impact districts unless that determination violates constitutional or statutory mandates. We emphasize that it is not our function to substitute our judgment for the state's political program in this respect, absent federal invalidity. We find no federal bar to this aspect of the state's political objective.

At the outset, we note that neither the Constitution nor the Voting Rights Act requires proportional representation. City of Mobile v. Bolden, 446 US 55, 64 L ed 2d 47 (1980); White v. Regester, 412 US 755, 37 L ed 2d 314 (1973). What is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength. *White v. Regester, supra.* As noted by the District of Columbia Court in State of Mississippi v. United States, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.* 444 US 1050 (1980), in applying § 5 criteria: "No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." Moreover, the Fifth Circuit has recognized that "the realities of partisan politics may enable a minority in some circumstances to exact more political concessions by swinging its vote to one of two candidates whose majority-race following is approximately equal than it could by electing a candidate of his own identity." Wyche v. Madison Parish Police Jury, 635 F. 2d 1151, 1160 (5 Cir. 1981). And "[a] court-ordered racial gerrymander which would assure that blacks form a sizeable electoral majority in a single district may not be nearly as effective a guarantee of access as the creation of two or more districts with substantial black voter populations such that all candidates in those districts must be responsive to the needs and aspirations

of the black electorate." United States v. Board of Supervisors of Forrest County, 571 F. 2d 951, 956 (5 Cir. 1978). Since the establishment of a "safe" minority seat is not a federal prerequisite of a reapportionment plan, *Wyche*, *supra*, at 1161, we conclude that the state's policy of favoring 40% or better black population districts was legitimate.

A consideration of these legitimate state political policies compels us to adopt, as an interim redistricting plan, the Simpson amendment. The Kirksey plans are repugnant to valid state policies inasmuch as they erode the electoral bases of incumbent congressmen in Districts 2 and 4, contain a larger population variance than the Simpson amendment, and disregard the state's policy of creating two high black impact districts. Moreover, these plans represent an obvious racial gerrymander by running a line from District 2 partially into metropolitan Hinds County and the City of Jackson solely to include a large and overwhelming black population corridor having little in common with the rest of what is essentially a rural district.

The Simpson amendment, on the other hand, more nearly satisfies the state's criteria by: (1) preserving constituencies of incumbents; (2) maintaining a population deviation of only .2141%; and (3) creating two 40% or better black districts. In addition, the Simpson amendment accords with racial fairness by including a majority black district of 53.77% centered in the Delta area. Plaintiffs challenge that the Simpson amendment or any other plan without a 65% or better black majority district violates the § 5 standard against retrogression of minority voting strength, relying upon Beer v. United States, 425 US 130, 47 L ed 2d 629 (1976). We reject this argument which is based upon the premise that the correct benchmark for measuring retrogression is former District 3, as it existed in the 1956 plan, and containing 11 Delta counties having a 65.51% black majority under

1960 census figures. Laying aside the state's position that retrogression should be determined by comparison with the 1972 plan, it is clear that since the Voting Rights Act became effective on November 1, 1964, retrogression must be determined in accordance with district lines existing no earlier than that date. The plan then in effect, i.e., the 1962 plan, contained the same Delta counties as the 1956 plan, combined with 13 other counties to form old District 2, which then had a 59.29% black majority population. Of course, if the district lines in effect on November 1, 1964, had never been changed, § 5 retrogression could not be implicated, even if there was a reduction in the percentage of blacks residing in former District 2. Computations show that, under 1980 census figures, the formerly 59.29% black majority district is now comprised of only 48.09% black population. Thus, the Simpson amendment with a 53.77% majority district represents an augmentation, rather than diminution, of black voting strength.

Other significant advantages inherent in the Simpson amendment are that it splits only two sparsely settled counties along established precinct lines, preserves a high degree of community of interest in all five districts, including the black majority District 2 which is chiefly an agricultural area, and satisfies concepts of contiguity and compactness. It is equitable that these considerations be taken into account in choosing a plan. We therefore find that the Simpson amendment most nearly satisfies constitutional and statutory constraints while reconciling state political policy, and direct it be used by the State of Mississippi pending preclearance of a statutorily permissible plan.

Accordingly, the court hereby establishes congressional districts for primary and general elections for 1982, and thereafter until a plan is precleared by the State under § 5 of the Voting Rights Act, as follows:

District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the aforesaid plan is appended to this opinion.

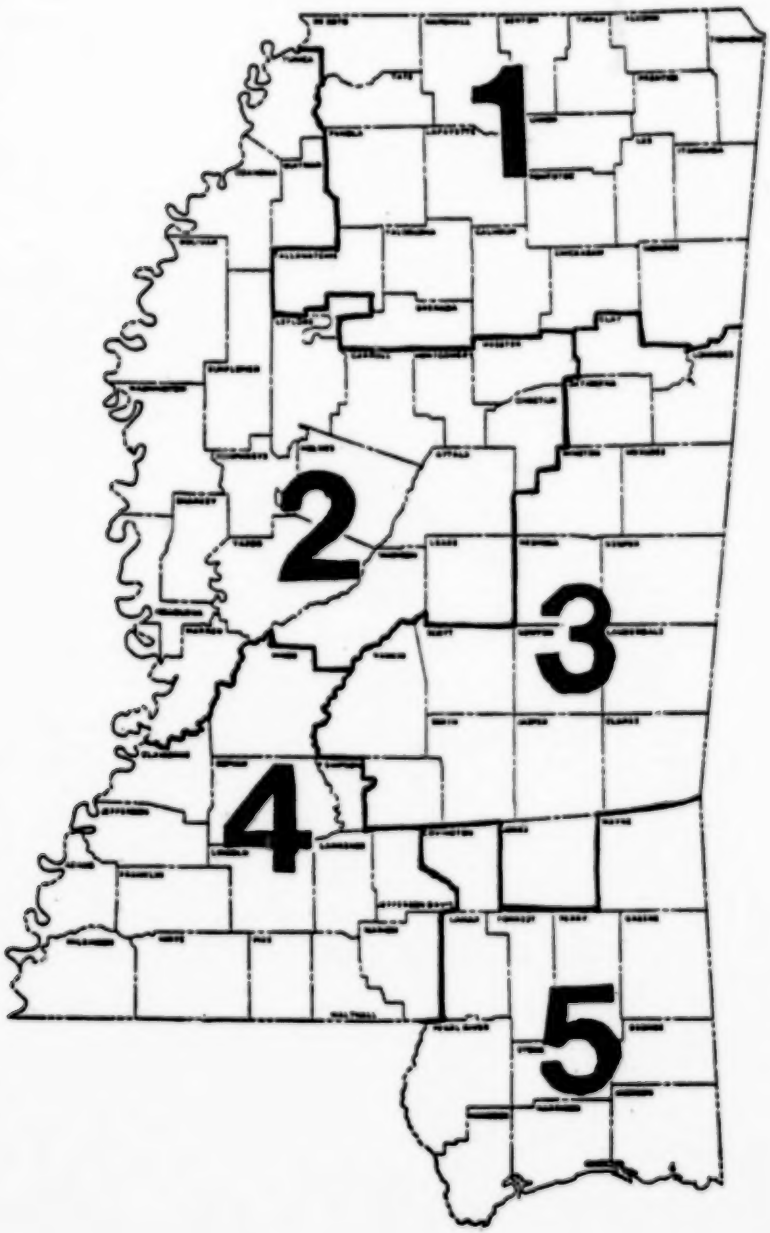
Furthermore, the court, after considering the time requirements for candidate qualification and campaigning, and to prepare for the orderly conduct of the 1982 con-

gressional primary and general elections, orders into effect the following schedules:

July 13, 1983 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1983 [sic]	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

Our order shall also specify further election procedures applicable to the 1982 congressional primary and general elections.

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

Plaintiffs

v.

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

ORDER

A three-judge court having been convened pursuant to law to hear the above consolidated actions, and after trial having decided the issues in accordance with Memorandum Opinion this date released, it is

ORDERED

1. S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, a statute providing for the redistricting of Mississippi's five congressional districts for the election of members of the United States House of Representatives, is legally unenforceable until it has been precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, and the above named defendants are hereby enjoined from implementing or seeking to implement such statute for election of members of the United States House of Representatives for Mississippi until it has been so precleared.

2. Miss. Code Ann. § 23-5-223 (1972), which prescribes the existing congressional districting plan for the State of Mississippi, is declared unconsitutional as violative of Art. 1, § 2, and the fourteenth amendment to the United States Constitution, and the above named defendants are hereby enjoined from hereafter enforcing or seeking to enforce said statute for election of members of the United States House of Representatives for Mississippi.

3. There is hereby ordered into effect an interim plan establishing congressional districts for primary and general elections for 1982, and thereafter until a redistricting plan enacted by the State of Mississippi is precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, as follows:

> District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the foregoing court-ordered interim congressional redistricting plan is appended hereto as Exhibit "A".

4. There is hereby ordered into effect the special time schedule and other procedures respecting the 1982 congressional primary and general elections:

July 13, 1982 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1982	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

5. All persons who have previously announced, paid qualifying fees and otherwise qualified as 1982 candidates for any congressional district may reannounce their candidacy on the basis of the districts hereinabove established and requalify with state and party officials, but are excused from paying additional qualifying fees; and in case a previously announced candidate may choose to run in a district having a different designation by number, such person may, upon direction to the appropriate officials, obtain transfer of the sum so paid. All Mississippi election statutes in conflict with the foregoing terms of this order are stayed only to the extent of such conflict for the initial purpose of conducting the 1982 congressional elections; otherwise provisions of state law remain unaffected.

The above named defendants with statutory and political party authority to conduct the 1982 congressional elections are hereby enjoined and commanded to schedule, prepare for, hold, conduct, and certify such elections strictly in accordance with ¶¶ 3, 4 and 5 hereof.

The court reserves the power to issue supplemental orders, should the need arise, to carry out the provisions of this order.

This, 8th day of June, 1982.

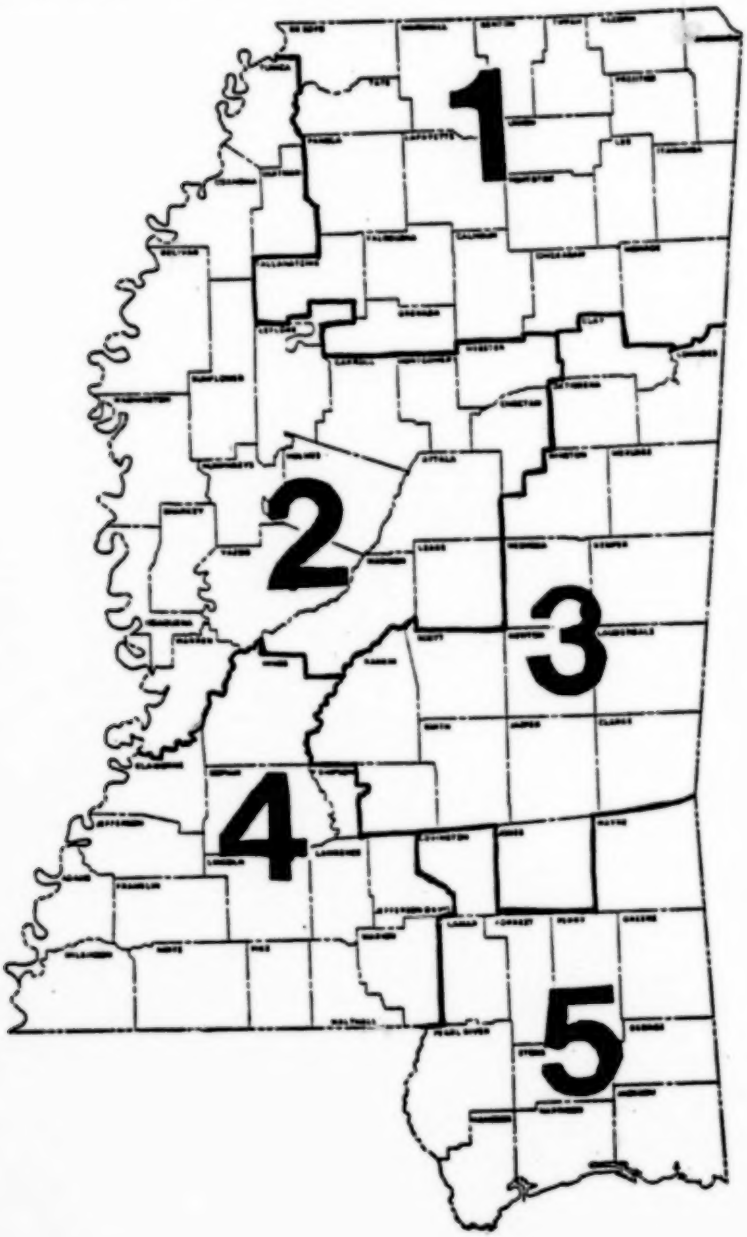
/s/ Charles Clark
United States Circuit Judge

/s/ William C. Keady
United States District Judge

/s/ L. T. Senter, Jr.
United States District Judge
[SEAL]

EXHIBIT "A"

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



APPENDIX B

Attorney General's Section 5 Objection Letter

[SEAL]

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Office of the Assistant Attorney General

Washington, D.C. 20530
30 Mar. 1982

Jerris Leonard, Esq.
Jerris Leonard & Associates
Suite 1020
900 Seventeenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Leonard:

This is in reference to Senate Bill No. 2001 (1981), providing for the reapportionment of the Mississippi Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received initially on November 10, 1981, and completed with additional information on January 29, 1982.

Under Section 5, the State bears the burden of showing the absence of both discriminatory purpose and effect in the proposed Congressional redistricting plan. *City of Rome* v. *United States*, 446 U.S. 156, 183 n.18 (1980); *Beer* v. *United States*, 425 U.S. 130, 140-141 (1976). While the State is under no obligation to maximize minority voting strength, the State must demonstrate that the plan "fairly reflects the strength of black voting power as it exists." *Mississippi* v. *United States*, 490 F.

Supp. 569, 581 (D. D.C. 1979), citing *Beer* v. *United States, supra,* 425 U.S. at 139 n.11 and 141; and *City of Richmond* v. *United States,* 422 U.S. 358, 362 (1975).

We have given careful consideration to all of the materials provided by the State, as well as to information and comments from other interested parties. As a backdrop for our analysis and determination in this matter, we note briefly the history of Congressional apportionment in Mississippi in recent years.

Since the late 1800's and until 1966, the State of Mississippi maintained a Congressional districting configuration which included a majority black district in the Mississippi Delta area. The State's reapportionment of 1966 did not continue a Delta district similar to the one which at that time had included a sixty-five percent black population majority. Rather, the 1966 plan inaugurated a districting configuration which fragmented the Delta area among three districts. That plan was never submitted for Section 5 preclearance but the federal district court, in an ensuing constitutional challenge to the plan (*Connor* v. *Johnson,* 279 F. Supp. 619 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967)), held that the plaintiffs had failed to carry the burden of proving purposeful discrimination pursuant to the Fifteenth Amendment. When the State reapportioned in 1972, following the 1970 Census, it essentially readopted the 1966 plan, making only those modifications necessary to satisfy the "one man, one vote" requirement. The State submitted the 1972 plan to the Attorney General pursuant to Section 5 and no objection was interposed. However, the Attorney General's decision was, as expressly stated in the 1972 no objection letter, not based on an independent review of the merits of the plan under Section 5, but, rather, rested solely on the view held at that time that the decision in *Connor* v. *Johnson, supra,* was binding on the Attorney General.

Later decisions of the United States Supreme Court have made it clear that any legislatively enacted reap-

portionment plan, may not be considered effective as law until it has received clearance under Section 5 regardless of other proceedings in federal court. See *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Finch*, 431 U.S. 407 (1977); *McDaniel* v. *Sanchez*, 101 S. Ct. 2224 (1981). The import of these decisions demonstrates that it was wrong in 1972 to defer to the decision in *Connor* v. *Johnson*, *supra*, without making an independent review of the plan on its merits under the purpose/effect standard of Section 5.

As a result of this highly unusual history of Congressional reapportionment in Mississippi, no Congressional reapportionment plan enacted since the effective date of Section 5 has received the scrutiny Congress intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, 94th Cong., 1st Sess. 19 (1975).

As the law now stands, we are not bound by the disposition of the 1966 plan by the *Connor* court or the formal preclearance of the 1972 plan in reviewing whether the instant apportionment has the proscribed purpose or effect. Rather, we are compelled by the more recent Supreme Court decisions reflecting the true intent of Congress under the Voting Rights Act, to assure ourselves that the instant plan "fairly reflects the strength of black voting power as it exists." *Mississippi* v. *United States*, *supra*, 490 F. Supp. at 581.

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2 and 3 of the reapportionment plan have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, therefore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the implementation of Senate Bill No. 2001 (1981) legally unenforceable.

If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-8388), Director of the Section 5 Unit. You can be assured that we are prepared to assist you in any way possible in connection with your reapportionment efforts.

Sincerely,

/s/ Wm. Bradford Reynolds
WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

cc: Honorable Bill Allain
Attorney General
State of Mississippi

APPENDIX C

Memorandum Opinion, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

MEMORANDUM

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge*.[1]

The State of Mississippi has filed this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1976), seeking a declaratory judgment that the 1981 reapportionment of the State's congressional districts (S.B. 2001) "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* This matter is now before the Court after full argument on plaintiff's motion for partial summary judgment and plaintiff's motion *in*

---

[1] Judge Richey, the third member of the panel, did not participate.

limine and the respective oppositions thereto filed by the United States and intervening defendants.

Mississippi seeks a determination prior to trial that the nonretrogression principle announced in *Beer* v. *United States*, 425 U.S. 130 (1976), requires that the effect of the 1981 reapportionment plan must be measured by comparison with the Mississippi reapportionment plan adopted in 1972. Further, by its motion *in limine* Mississippi seeks an order "limiting the evidence on the issue of discriminatory purpose to the legislative process in 1981 which culminated in the development and enactment" of the 1981 plan. In opposition it is urged that the Court must consider in this proceeding pre-1981 evidence of the alleged continuing purpose of Mississippi to discriminate and that the retrogressive effect of the 1981 plan should be measured by comparison with apportionment plans in effect in 1964 or prior thereto.

The crux of this dispute is the claim that Mississippi has divided black voters residing in the so-called Delta Region among several different congressional districts for the purpose of preventing the election of a black to the United States Congress. The Delta Region is a distinct geographical and cultural region in the northwestern part of the State. Although black persons residing in the State comprise only 35.2 percent of the total population, the Delta historically had a high proportion of blacks and according to the most recent Census was majority black in 1980. Given the apparent prevalence of block voting in Mississippi, the United States claims that Mississippi's current apportionment scheme continues to deprive blacks of the opportunity to elect one of their own race to the House.

A brief review of the developments in Mississippi will aid understanding of our decision. The stipulated record demonstrates that since the late nineteenth century through the date of enactment of the Voting Rights Act,

the Delta Region has been contained in one congressional district despite numerous other districting changes required by changes in population or political considerations over this period. Although blacks were a potential electoral majority in the Delta district under each of these various plans, they exerted virtually no political control because of the State's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting. . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965). In 1964, only 6.7 percent of blacks in Mississippi eligible to vote were registered. As various restrictions on black registration and voting were removed, blacks in the Delta Region gained more and more voting strength.

In 1965 a suit was instituted in federal court, challenging the then-exsiting 1962 plan as violative of the one-person, one-vote formula. *Connor* v. *Johnson*, Civ. 3380 (S. D. Miss. October 19, 1965). In response to this litigation the State legislature undertook a comprehensive reapportionment of the State congressional districts. Under the plan adopted by the legislature on April 7, 1966, the Delta Region, which had a longitudinal configuration, was divided horizontally among three districts, eliminating the 59 percent black majority that then existed in the Delta Region. As a result of this reapportionment no district in the State had a majority black voting age population. This plan was submitted to the *Connor* v. *Johnson* Court, which held that the plan was not racially discriminatory and also satisfied the one-man, one-vote constitutional standard. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). Although this apportionment plan required preclearance pursuant to section 5 of the Voting Rights Act, *see McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), it was not submitted to the Attorney General for preclearance nor was it the subject of a declaratory judgment action in the United States District Court for the District of Co-

lumbia. As a result, the 1966 plan was never scrutinized under Voting Rights Act standards.[2]

Following the 1970 Census the State of Mississippi was required to adopt a new apportionment plan to reflect population changes. In broad outline, however, the State simply reenacted the 1966 plan; each of the State's five congressional districts was majority white in population. The State submitted this 1972 plan to the Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. The Attorney General did not make a factual determination as to whether the State had demonstrated that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Rather, it was simply indicated:

> The Attorney General will not object to [the 1972 plan]. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

---

[2] Plaintiff's suggestion that the ruling that apportionment plans are subject to section 5 review, *see* Georgia v. United States, 411 U.S. 526 (1973), should only be applied prospectively in light of Allen v. State Board of Elections, 393 U.S. 544 (1969), is entirely without merit. Although the *Allen* Court declined to overturn elections based on various enactments affecting voting which were not clearly within the scope of section 5 prior to the Court's decision, the Court did not suggest that the enactments could be used in the future either for the purpose of conducting elections or as benchmarks against which to measure future electoral changes under section 5. Indeed, the Court specifically directed the District Courts on remand "to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." *Id.* at 572.

This position was consistent with the then-policy of the Department of Justice not to make a section 5 determination in those instances where the voting change had previously been addressed by a federal district court and found to meet constitutional standards. *See Morris* v. *Gressette*, 432 U.S. 491, 497, n.8 (1977); *Georgia* v. *United States*, 411 U.S. 526, 535 n.6 (1973).

Subsequent Supreme Court decisions reveal the error of this policy. It is now clear that section 5 preclearance procedures must be followed even where there has been a federal court determination that the plan meets constitutional standards. *See McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Waller*, 421 U.S. 656 (1975) (*per curiam*); *Harper* v. *Levi*, 520 F.2d 53, 69 (D.C. Cir. 1975). (Attorney General's deference to constitutional adjudication is "fundamentally inconsistent with clearly expressed congressional intent underlying Section 5"). Indeed, it is now apparent that the *Connor* v. *Johnson* Court lacked jurisdiction to consider the constitutionality of the plan before it had been precleared pursuant to section 5. *See McDaniel* v. *Sanchez*, 452 U.S. at 153.

In 1981 Mississippi was again required to adopt a new congressional apportionment plan to reflect further population changes disclosed by the 1980 Census. Although the legislature discussed the possibility of recreating a black majority vote in the Delta district this, as well as other alternatives, was rejected. The adopted plan provides for five congressional districts with a configuration virtually identical to the 1966 and 1972 lines; each of these districts is majority white. The plan was submitted to the Attorney General for section 5 review and on March 30, 1982, a timely section 5 objection was interposed. The plan is now before this Court for section 5 review.

In April, 1982, certain black residents of the State of Mississippi, some of whom are also defendant-intervenors

in this action, filed suit in the United States District Court for the Northern District of Mississippi seekng to enjoin implementation of the 1981 plan because it had not been approved by the Attorney General or this Court. The plaintiffs also sought to enjoin implementation of the congressional districting plan adopted in 1972 on the ground that the existing districts were unconstitutionally malapportioned. After the parties had fully briefed the issues in this case but prior to oral argument the Mississippi Court issued an opinion holding the 1972 plan unconstitutional as violative of the one-man, one-vote principle and enjoined its use. The Court also enjoined implementation of the 1981 plan pending a determination by this Court that the plan does not violate the Voting Rights Act or until another redistricting plan enacted by the State of Mississippi is precleared in accordance with section 5.

Given the need promptly to establish an electoral scheme to govern imminent congressional primary and general elections and its understanding that this Court could not rule on the 1981 plan for several months, the Mississippi Court ordered into effect an interim plan for the 1982 elections. Based on evaluation of black voting strength under different voting schemes, one-man, one-vote considerations, as well as various state political factors, the Court adopted the so-called Simpson amendment, which was considered but ultimately rejected by the legislature in 1981 in favor of S.B. 2001. The Simpson amendment provides for a black majority district of 53.8 percent centered in the Delta Region. The Simpson plan remains in effect until a redistricting plan enacted by the State of Mississippi is preclared under section 5 of the Voting Rights Act.

As initially presented to the Court upon the briefs, this motion for partial summary judgment raised the issue whether the Court was required to compare the 1981 plan to the 1972 plan or, in the alternative, to the prior

plan adopted in 1966, in determining whether the 1981 plan has an impermissible retrogressive effect, or whether instead the proper benchmark for such determination was some other apportionment plan adopted prior to 1966. It is very doubtful that an apportionment plan never reviewed on the merits under section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for the purpose of measuring the possible discriminatory effect of subsequent plans. Although certain decisions appear to suggest that the existing plan is at least presumptively the appropriate benchmark, those opinions are distinguishable on their facts from the problem presented here. *See Beer* v. *United States*, 425 U.S. 130 (1976); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Furthermore, it would appear inconsistent with the intent of Congress in requiring section 5 review of every electoral change "different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, to hold that an apportionment plan that is retrogressive as compared to the plan in effect on the effective date of the Act establishes a new benchmark for section 5 review. Whether in fact the 1981, the 1972 or the 1966 plans are retrogressive relative to the apportionment plan in effect on November 1, 1964, can, of course, be resolved only after a full hearing. In any event, the Court finds it unnecessary definitively to resolve these issues, at least at this time, in view of the recent order of the Three-Judge District Court for the Northern District of Mississippi.

The Court holds that whether or not the 1972 reapportionment plan (or prior 1966 plan) can serve as a benchmark, S.B. 2001 must, at a minimum, be shown not to be retrogressive relative to the plan ordered into effect by the Three-Judge Mississippi Court. In *United States* v. *Mississippi*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980), the Court held based on almost identical facts that a judicial plan ordered into

effect subsequent to the filing of a section 5 declaratory judgment action should be considered the preexisting plan and at least the initial benchmark against which to assess the effect of the statutory plan, *id.* at 582.[3] We believe that this decision stands for at least this much: a section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented absent approval of the statutory plan. It would be entirely inconsistent with the teaching of *Beer* to suggest that the Court must accept a statutory plan that increases black voting strength to a lesser degree than a court-ordered plan in effect merely because the court-ordered plan will exist only until another plan is precleared under section 5.

On the present record, it appears that this initial inquiry may be decisive of the issue whether the 1981 plan violates the nonretrogression standard of the Voting Rights Act. Accordingly, we will defer any definitive resolution of the question whether either the 1972 or 1966 plan may serve as a benchmark pending a full factual inquiry into the possible retrogressive effect of the 1981 plan relative to the court-ordered plan. If plaintiff is of the view that it can establish that the 1981 plan is not retrogressive in comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date. Mississippi's continuing

---

[3] We note that the Supreme Court's summary affirmance has only limited precedential value, especially given that the District Court noted in the alternative that the plan under review satisfied the nonretrogression principle when compared to the earlier 1975 plan. 490 F. Supp. at 582 n.6. *See* Fusari v. Steinberg, 419 U.S. 379, 391-92 (Burger, C.J., concurring) (summary affirmance of three-judge court "affirm[s] the judgment but not necessarily the reasoning"). On the other hand, the affirmance is perhaps due added weight because the three Justices who dissented on the merits explicitly stated that the court-ordered plan was the proper benchmark. *See* 444 U.S. at 1052 (Marshall, J. dissenting).

right to seek approval of any plan under section 5 at any time must be fully recognized.

The only remaining issue is whether evidence pertaining to possible discriminatory intent should be limited to the 1981 legislative process or whether evidence of the alleged discriminatory purpose underlying prior apportionment plans and carried forward by S.B. 2001 may be considered. The motion *in limine* will be denied. The value of historical background information for the purpose of assessing present discriminatory intent is well recognized. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977); *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980). The appropriate weight, if any, to give this evidence can be determined by the Court based on a more complete legal and factual record.

Both the motion for partial summary judgment and the motion *in limine* shall be denied. An appropriate Order is filed herewith.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

ORDER

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge.*

For the reasons stated in the Court's Memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff's motion *in limine* is denied; and it is further

ORDERED that a status conference is set in Courtroom No. 6 at 9:00 a.m. on July 14, 1982, to set a definite schedule for any further proceedings that may be deemed appropriate.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

APPENDIX D

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

Civil Action No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

vs.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

[Filed Jun. 15, 1982]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Owen H. Brooks, Sarah H. Johnson, Harold R. Mayberry, Willie Long, Robert

E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, plaintiffs in *Brooks* v. *Winter*, Civil No. GC 82-81-WK-O, hereby appeal to the Supreme Court of the United States from the Order entered in this action on June 9, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Johnnie E. Walls, Jr.
JOHNNIE E. WALLS, JR.
Walls, Buck & Irving, Ltd.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

FRANK R. PARKER
WILLIAM L. ROBINSON
BARBARA Y. PHILLIPS
PATRICIA M. HANRAHAN
Lawyer's Committee for Civil Rights Under Law
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

ROBERT BRUCE MCDUFF
Ratner & Sugarmon
Suite 525
Commerce Title Building
Memphis, Tennessee
(901) 525-8601

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Johnnie E. Walls, Jr., certify that all parties required to be served have been served.

This the 15th day of June, 1982.

/s/ Johnnie E. Walls, Jr.
JOHNNIE E. WALLS, JR.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory

judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.